

BERNARD J. BRAKER

IBLA 80-739

Decided May 5, 1981

Appeal from decision of Alaska State Office, Bureau of Land Management, declaring placer mining claim abandoned and void. AA-31337.

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Evidence: Credibility--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim

Where a preponderance of the evidence supports a finding that all documents necessary to effectuate a filing under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), were timely filed, a decision declaring a mining claim abandoned and void for failure to file timely the required documentation will be vacated.

APPEARANCES: Randall E. Farleigh, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Bernard J. Braker has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 6, 1980, declaring the BBK #2 placer mining claim, AA-31337, abandoned and void pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and its implementing regulations, 43 CFR 3833.2-1(a) and 43 CFR 3833.4(a). The rationale for the decision was that appellant had failed to file either evidence of annual assessment work or a notice of intention to hold the claim for the 1979 assessment year on or before October 22, 1979.

In his statement of reasons for appeal, appellant contends that he, through an agent, filed evidence of annual assessment work for the 1979 assessment year on October 9, 1979, the same date on which his notice of location was filed and the filing fee paid, but that the document was lost by BLM. Appellant submits a document entitled "Assessment Work Affidavit," dated October 2, 1979, and signed by Robert Carlson. The document indicates that it was recorded with the Seward Recording District on October 4, 1979. Appellant also submits an affidavit of Renae Peters, dated June 19, 1980. Therein, she states, in relevant part:

2. That during the fall of 1979, I was assisting Mr. B. J. Braker whenever possible with his local business affairs when he was out of town on contracting jobs.

3. That at the request of B. J. Braker during his absence, I awaited a document, believed to be an Affidavit of Annual Labor, given to me by Mr. Robert Carlson on October 7th or 8th of 1979. I placed that document in Mr. Braker's mining file, together with other documents, and took the entire file down to the Alaska State Office of the Bureau of Land Management in Anchorage, Alaska on October 9, 1979. I also took with me a blank check for necessary filing fees previously signed by Mr. Braker. On October 9, 1979, at the offices of the Bureau of Land Management, I talked with Mr. Jeff Carter, a BLM employee.

4. I told Mr. Carter that I wanted to file on a gold claim and asked him what he needed.

5. I put the file on the counter and went through it as Mr. Carter looked on.

6. Mr. Carter told me what he needed and I pulled out the necessary documents.

7. I believe Mr. Carter made copies of whatever was needed and returned the originals to me.

8. I gave a check payable to the BLM for \$5.00 and Mr. Carter issued me a receipt for the one mining claim filed, BBK#2.

9. That I believed at that time that all documents necessary for filing to preserve the claim for Mr. Braker had been produced for Mr. Carter at the BLM.

10. That I believe that more than one document was produced and given to Mr. Carter for copying at BLM, including the location notice.

11. I then returned to the residence of Mr. B. J. Braker and left the file containing all the mining documents. [Emphasis added.]

Appellant also submits an affidavit of Robert Carlson, dated June 18, 1980. Carlson states that he personally handed the "Affidavit of Annual Labor" to Renae Peters and that he "had previously discussed with Renee [sic] Peters the necessity of filing the Affidavit with the Bureau of Land Management before the October, 1979, deadline." ^{1/} Appellant includes his own affidavit dated June 18, 1980. He states that he left Anchorage on or about October 8, 1979, to work in another area; that he left his mining file with Renae Peters; that upon his return he was informed by Renae Peters that she had obtained a document from Robert Carlson, placed it in the mining file and taken the contents to BLM for filing; and that upon his return his mining file "contained all necessary documents, including the original Affidavit of Assessment for assessment year ending September, 1979, on BBK #2."

Appellant argues that certain circumstances associated with the filing of his evidence of annual assessment work suggest that BLM did indeed lose the document. He states that the computer used by BLM to assign serial numbers to claims and to note the filing of documents with respect to those claims was not functioning at the time the filing was made in this case on October 9, 1979. Therefore, the affidavit of

^{1/} Mr. Carlson indicated that he performed the assessment work for appellant; that he prepared an "Assessment of Annual Labor" and mailed it to the Seward Recording office on October 2, 1979; and that it was returned to him on October 7 or 8, 1979.

assessment work could have easily been separated from the notice of location. Furthermore, if separated, the affidavit would not be easily identified because it was signed by someone other than appellant.

Appellant also argues that the Government is estopped to deny the timely filing of his evidence of annual assessment work. He requests a hearing.

[1] The applicable regulation, 43 CFR 3833.2-1(a), provides:

The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim. [Emphasis added.]

See 43 U.S.C. § 1744(a) (1976). 43 CFR 3833.4(a) provides the penalty for failure to satisfy the filing requirement of 43 CFR 3833.2-1(a): "The failure to file an instrument required by §§ 3833.1-2(a), (b), and 3833.2-1 of this title within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill or tunnel site and it shall be void."

[2] Under the circumstances of this case, we believe that appellant's evidence of annual assessment work should be deemed to have been filed timely. It appears that the file which was submitted to BLM on October 9, 1979, by appellant's agent contained evidence of annual assessment work for the 1979 assessment year. The affidavits confirm that it was given to appellant's agent, placed in the file and was in the file when returned to him. Furthermore, there is evidence that this document was taken by a BLM employee, copied and the copy kept by BLM. Renae Peters believed that "more than one document * * * including the location notice" was taken out of the file for copying. As the deadline for filing both the notice of location and evidence of annual assessment work for appellant's claim was approaching, it is reasonable to assume the BLM employee also took the latter document out of the file. Appellant's evidence supports his contention that BLM lost his evidence of annual assessment work, or at least supports that possibility.

There is a legal presumption of regularity which attends the official acts of public officers in the proper discharge of their official duties. However, the presumption is rebuttable. L. E. Garrison, 52 IBLA 131 (1981). While appellant has not conclusively established that BLM received his evidence of annual assessment work on or before

October 22, 1979, nevertheless, we believe that a preponderance of evidence before us supports a finding that the required document was timely filed. See L. E. Garrison, supra; see also E. Joe Swisher, 44 IBLA 44 (1979).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded to BLM for further action not inconsistent herewith.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

